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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1843

JOSEPH ACANFORA III,

Petitioner,

v.

BOARD OF EDUCATION OF MONTGOMERY COUNTY, et al.,

Respondents.

BRIEF AMICUS CURIAE OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTEREST OF AMICUS CURIAE*

Lambda Legal Defense and Education Fund, Inc., is a New York corporation organized to seek, through the legal process, to insure the legal rights of homosexuals. It is similar in scope and purpose to the NAACP Legal Defense and Educational Fund, Inc., and seeks to function for homosexuals in the same way the NAACP Legal Defense and Educational Fund, Inc., has functioned for black citizens. Lambda Legal Defense and Education Fund, Inc., (hereinafter "Lambda") is authorized to practice law by the courts of New York.

In accordance with its purpose to

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*This brief is filed with the consent of the parties. The letters of consent are filed with the Clerk of the Court.

seek to insure, through the legal process, the legal rights of homosexuals, Lambda is interested in and concerned by the decision of the court below which denied any relief to the petitioner, Joseph Acanfora III, a homosexual teacher who was transferred from his classroom teaching duties to administrative duties and whose contract with respondent was not renewed because of his homosexuality.

Lambda urges that the aforesaid action of respondent was a denial of equal protection of the law and of petitioner's constitutional right to freedom of speech and association and his constitutional right of privacy.

Lambda has taken this extraordinary step of filing a brief amicus curiae in support of the petition for a writ of

certiorari because of the devastating effect the refusal of the court below to grant petitioner any relief will have on the exercise of the constitutional rights of freedom of association and speech by homosexuals and because of the encouragement and sanction the decision of the court below will give to the invasion of the right of privacy of homosexuals and the denial of equal protection of the law to them if the court below's denial of relief is allowed to stand.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 491 F. 2d 498 and is set forth in the Appendix to the Petition for a Writ of Certiorari. The opinion of the United

States District Court for the District of Maryland is reported at 359 F. Supp. 843 and is set forth in the Appendix to the Petition for Certiorari.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 7, 1974. An order granting an extension of the period of time in which to file the Petition for Certiorari to June 7, 1974, was issued by Chief Justice Burger on April 30, 1974. Jurisdiction in the United States District Court was grounded on 42 U.S.C. §1983 and 28 U.S.C. §§ 1331, 1343(3), and 1343(4).

STATEMENT OF THE CASE

Pursuant to Rule 42(5) of this Court, the statement of the case is omitted in this brief amicus curiae, and the Court is referred to the statement of the case in the Petition for Certiorari.

QUESTIONS PRESENTED

1. Did the refusal of the Court of Appeals to grant petitioner any relief because of his failure to list his membership in the homophile student organization violate petitioner's right to freedom of association and right of privacy?

2. Was the requirement, read into respondent's teaching application form by the Court of Appeals, that petitioner list all

organizations to which he belonged, including the homophile student organization, unconstitutionally broad as an infringement on petitioner's freedom of association?

3. Is the decision of the Court of Appeals in conflict with the decision of this Court in Shelton v. Tucker, 364 U.S. 479 (1960)?

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Fourth Circuit has decided an important question of federal law in a manner which denies homosexuals the right to be free from unwarranted and impermissible governmental discrimination as a result of the exercise of their constitutional right of freedom of association

and for seeking to protect their constitutional right of privacy in their associations. The court below decided the question adverse to petitioner, denying him any relief. The question of the constitutional protection due homosexuals in their associations has not been settled by this Court, and it should be, for it affects the right to life and liberty free from governmental discrimination in violation of the constitutional guarantee of equal protection of the law of several million homosexuals. Further, the decision of the Court of Appeals is in conflict with the decision of this Court in Shelton v. Tucker, 364 U.S. 479 (1960).

I. The Refusal of the Court of Appeals to Grant Petitioner Any Relief Because of His Failure to List His Membership in the Homophile Student Organization Violates Petitioner's Right to Freedom of Association and Right of Privacy.

The right to freedom of association, in no matter how unorthodox or unconventional a manner, is a fundamental guarantee under the Constitution. N.A.A.C.P. v. Button, 371 U.S. 415 (1963). The range of this interest shields the individual from unreasonable governmental interference because it is "essential to the orderly pursuit of happiness by free men", Meyer v. Nebraska, 262 U.S. 390, at 399 (1923). "It is beyond debate that freedom to engage in association . . . is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment . . . [and] it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." N.A.A.C.P. v. State of Alabama, 357 U.S. 449, at 460 (1958).

The critical importance of free association for homosexuals, either for their social or political benefit, has begun to be recognized by some lower courts, but has not been ruled upon by this Court. In view of the decision of the court below which in effect sanctions discrimination against petitioner for exercising his right to freedom of association, it is imperative that this Court declare the right to freedom of association free from governmental reprisals for the homosexual minority.

The District Court for the Northern District of Georgia, in Woods v. Davison, 351 F. Supp. 543 (N.D. Ga. 1972), and the District Court for the District of New Hampshire, in Gay Students Org. of U. of New Hampshire v. Bonner, 367 F. Supp. 1088 (D. N.H. 1974), held that the homosexual

student groups on these campuses were entitled to access to university facilities and all other rights attendent to official recognition of any other student group. Following Healy v. James, 408 U.S. 169 (1972), which stated that, absent a lawful justification, students groups could not have their associational rights abridged by denial of recognition, both courts asserted the importance of organizing for these students to further their common interests.

In Owles v. Lomenzo, 31 N.Y. 2d 965, 341 N.Y.S. 2d 108 (1973), the New York Court of Appeals approved incorporation for the Gay Activists Alliance, Inc. The group was organized to allow assemblage of homosexuals to foster the repeal of laws which discriminate against them as a class and the passage of laws which

guarantee equal treatment for all persons regardless of sexual orientation. The New York Court of Appeals also approved the application of Lambda Legal Defense and Education Fund, Inc., as a legal assistance corporation in In re Thom, 53 N.Y. 2d 609, 347 N.Y.S. 2d 571 (1973). In his concurring opinion, Judge Burke acknowledged that Lambda's organizing to legally "insure equal protection of the laws and the protection of civil rights of homosexuals", Id. at 611, 347 N.Y.S. 2d at 572, was an essential part of its First Amendment rights to further its goals, particularly as homosexuals were a minority subjected to varied discriminations. The decision of the court below in the instant case, if allowed to stand, would vitiate these earlier gains in judicial recognition of the freedom of association of

homosexuals, and would have a devastating and chilling effect on the exercise of those rights.

II. The Right to Privacy in Associations is Crucial to the Viability of the Freedom of Homosexuals to Associate.

When the N.A.A.C.P. refused to disclose its membership lists to state officials, the Supreme Court stated that "inviolability of privacy in group associations may in many circumstances be indispensible to preservation of freedom of association, particularly where a group espouses dissident beliefs." N.A.A.C.P. v. State of Alabama, 357 U.S. 449, at 462 (1958). The circumstances in which the N.A.A.C.P. was functioning were found to have "exposed . . . members to economic reprisal, loss of employment, threat of physical coercion, and

other manifestations of public hostility", Id. at 462, if their membership was revealed. For homosexuals, hidden in their "closets", these circumstances are everyday realities; for petitioner, it was explicitly stated at trial that if he had revealed his membership in a homosexual group, he would never have been hired.

The Supreme Court held in N.A.A.C.P. v. State of Alabama that the organization could not be compelled to disclose its membership list because, by dissuading others from joining or members to quit, these circumstances adversely affected the effective pursuit of N.A.A.C.P.'s and its members' rights to advocate their beliefs. See also Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 555-557 (1963); Louisiana ex rel. Gremillion v. N.A.A.C.P.,

et al., 366 U.S. 293, 296 (1961); Bates v. Little Rock, 361 U.S. 516, 523-524 (1960); Bursey v. United States, 466 F. 2d 1059, 1083-1086 (9th Cir. 1972). The effect of compulsory disclosure by petitioner of his organizational ties is to disable, just as pervasively, the legitimate functioning of homosexual rights groups. The clear message is that, if individuals are interested in belonging to one of these organizations, which is their constitutional right, they will be compelled to disclose that membership and expose themselves to serious reprisals. Therefore, millions of homosexuals will be dissuaded from exercising their right to associate, and thus the effectiveness of these organizations in combating the discrimination visited upon homosexuals will be destroyed.

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute. . . [an] effective . . . restraint on freedom of association . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations." N.A.A.C.P. v. State of Alabama, supra at 1171-1172.

III. Requiring Petitioner to List All Organizations and Extracurricular Activities is Unconstitutionally Broad

The application form for a teaching position in the Montgomery County school system asks for information about one's professional, service and fraternal organizations. Petitioner answered this by listing his student membership in the Pennsylvania State Education Association. His membership in the Homophiles of Penn State, however, does not fit into any of the three above categories. The application also

requests information about one's extracurricular activities. Here petitioner listed swimming, bowling, student council, magazine and newspaper staffs, honor society, and Naval Reserve Officers Training Corps. Although he could have included his Homophile membership in this answer. and even admits that he consciously omitted it from the application, there is no indication that this information was required. The oath which he signed merely stated that the information included was "accurate", not that it was complete. In the cases relied on by the Court of Appeals, in holding that this omission was prejudicial to his case, all of the parties being charged had given false answers to direct questions. Bryson v. United States, 396 U.S. 64 (1969); Dennis v. U.S., 384 U.S. 855 (1966); Kay v. United

States, 303 U.S. 1 (1938); United States v. Kapp, 302 U.S. 214 (1937); Rodriguez v. Seamans, 463 F. 2d 837 (D.C. Cir. 1972), petition for cert. dismissed, 409 U.S. 1094 (1973); Williams v. United States, 434 F. 2d 1346 (Ct. Cl. 1970). That is not the case here.

In Shelton v. Tucker, 364 U.S. 479 (1960), an Arkansas statute required public school teachers to submit an affidavit listing all organizational memberships during the preceding five years. The Court noted that the teachers worked under the "absolute will of those to whom disclosure must be made", Id. at 486, and the lack of confidentiality concerning the lists allowed for public pressure to be brought on school officials to discharge those "who belong to unpopular or minority organizations". Id. at 486-487.

> "'Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice.'" Wieman v. Updegraff, supra, at 195 as cited in Shelton, supra, at 487.

The Court held that compulsory disclosure of every associational affiliation was a "comprehensive interference with associational freedom [which] goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." Id. at 490. Cf., Elfbrandt v. Russell, 384 U.S. 11, 18 (1966); Hobbs v. Thompson, 448 F. 2d 456, 460 (5th Cir. 1971); Ricks v. District of Columbia, 414 F. 2d 1097 (5th Cir. 1969); Nat'l. Student Assoc. v. Hershey, 412 F. 2d 1103 (D.C. Cir. 1969). Under this Court's decision in Shelton, respondent

herein could not constitutionally be compelled to list his membership in the Homophiles of Penn State. Thus, even aside from the failure of the application form to specifically request that information, the question as to extracurricular activities must, in light of Shelton, be read as not requesting the listing of that information. The decision of the court below is, therefore, in conflict with this Court's decision in Shelton, and creates the same unconstitutionally broad requirement that petitioner list all of his associational ties as this Court condemned in Shelton.

IV. The Montgomery County Public School Board Does Not Have a Sufficient Interest to Compel Disclosure of All Petitioner's Associational Ties.

Although the right of association is not absolute and may be superceded by a compelling state interest, the state must

show that there is a compelling reason for disclosure in order to be able to interfere with petitioner's right of association. DeGregory v. Attorney General, 383 U.S. 825 (1966); Shelton, supra; Bursey v. United States, supra; James v. Bd. of Ed. of Central Dist. No. 1, et al., 461 F. 2d 566 (2nd Cir. 1972), petition for cert. denied 409 U.S. 1042 (1972), reh. denied 410 U.S. 947 (1973). In the instant case, there is not even a reasonable relationship between petitioner's membership in the Homophiles of Penn State and his ability to teach. There were findings to show that his performance both as a student teacher and as a teacher was satisfactory; that he did not discuss or even intend to discuss homosexuality in the classroom; that there was no disruption or even a possibility of disruption of the school; and

that many of the students and teachers offered petitioner their support.

The issue of the relationship between one's homosexuality and one's ability to function effectively has recently been seriously considered in many different areas. The almost unanimous opinion has been that homosexuality per se does not adversely affect such ability and the party seeking to show that it does must sustain the burden of proof. Wentworth v. Schlesinger, 490 F. 2d 740 (D. C. Cir. 1973) (security clearance); Norton v. Macy, 417 F. 2d 1161 (D. C. Cir. 1969) (federal civil service employee); Scott v. Macy, II, 402 F. 2d 644 (D. C. Cir. 1968) (federal civil service applicant); Society for Individual Rights v. Hampton, ___ F. Supp. ___ (N. D. Cal. 1973, No. C-73-0139 AJZ); Gayer v. Laird, 332 F. Supp. 169 (D. D. C.

1971) (security clearance); In re Labady, 326 F. Supp. 924 (S. D. N. Y. 1971) (naturalization); In re Kimball, 33 N. Y. 2d 586, 347 N. Y. S. 2d 453 (1973) (State Bar applicant); Morrison v. State Bd. of Ed., 1 Cal. 3d 214, 461 P. 2d 375, 82 Cal. Rptr. 175 (1969) (teacher). Petitioner's own successful teacher certification in Pennsylvania indicates that he is a fit person to teach and his homosexuality does not adversely affect his fitness. The District of Columbia Board of Education adopted a resolution on May 23, 1972, of non-discrimination in its school system on the basis, inter alia, of "personal sexual orientation". And in California, the Court of Appeals held that homosexuality per se could not be grounds for a teacher's discharge but the school board must show a reasonable connection

between the homosexuality and unfitness to teach. Morrison, supra. Thus, since homosexuality alone cannot sustain the burden of proof of unfitness, there is no reasonable reason for the respondent to compel disclosure of petitioner's membership in homosexual organizations.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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